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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 469

WILLIAM H. MILEY, PETITIONER

v.

ROBERT A. LOVETT, SECRETARY OF DEFENSE OF THE UNITED STATES; FRANK C. PACE, JR., SECRETARY OF THE ARMY; AND JOSEPH LAWTON COLLINS, CHIEF OF STAFF, UNITED STATES ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the District Court (R. 64–70) is unreported.

JURISDICTION

The Court of Appeals has not yet decided the appeal. The petition for the writ of certiorari was filed on December 7, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 28 U. S. C. 2101 (d).

QUESTIONS PRESENTED

1. Whether a matter of such exceptional public interest is involved as to warrant the granting of the petition for certiorari prior to final judgment by the Court of Appeals in a case in which it has already heard argument.

2. Whether the commission of an officer appointed during wartime in 1946 in the Officers' Reserve Corps, Army of the United States, was of five years' duration, or of continuing duration until six months after termination of the war.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 7–11.

STATEMENT

Petitioner filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia directed to the Secretary of Defense, the Secretary of the Army, and the Chief of Staff, alleging that he was being unlawfully detained as a captain recalled to active duty in the Army of the United States (R. 1–3). The pertinent facts may be summarized as follows:

After having been inducted in 1943, petitioner was honorably discharged as an enlisted man and commissioned a second lieutenant in the Army of the United States (R. 2, 8, 11–12). He had reached the rank of captain by July 31, 1946, when he was relieved from active duty (R. 2, 13). On the same day, upon his application, he was

appointed a captain in the Judge Advocate General Department, Officer Reserve Corps in the Army of the United States (R. 2, 8, 14A–16A).

On November 27, 1950, in conformity with Section 2, Selective Service Extension Act of 1950 (Public Law 599, 81st Congress), extending the Selective Service Act of 1948, 62 Stat. 604, Sec. 21 (50 U. S. C. App., Supp. IV, 451 *et seq.*), the President ordered the petitioner into active military service for a period of 21 months. Petitioner reported for active duty on January 2, 1951, as a captain, Judge Advocate General Corps in the Officers' Reserve Component of the Army of the United States. (R. 3, 10, 17–18.) An order for petitioner's assignment to overseas duty in Germany was issued on August 31, 1951 (R. 10, 18). On September 10, 1951, petitioner wrote the Adjutant General of the Army requesting immediate honorable separation from the Service on the ground that his reserve commission had expired on July 31, 1951, five years after its acceptance on July 31, 1946 (R. 11, 38–39).

The petition for habeas corpus was filed on September 12, 1951 (R. 1–3), and on the same day petitioner was assigned to duty in the Branch Office of the Judge Advocate General at Fort Holabird, Baltimore, Maryland (R. 11). Subsequent to the filing of the return (R. 7–11), a hearing was held on October 8, 1951, at which

evidence was introduced by stipulation and exhibits (R. 64). The District Court on October 24, 1951, entered an order discharging the writ of habeas corpus and dismissing the petition (R. 70–71).

On October 26, 1951, petitioner filed a notice of appeal to the Court of Appeals for the Fourth Circuit (R. 71). While this appeal was pending and before judgment thereon petitioner filed his petition for a writ of certiorari. On January 9, 1952, the Court of Appeals heard argument on the merits.

ARGUMENT

1. The petition for certiorari should be denied as premature since filed prior to judgment by the Court of Appeals. Cf. *United States* v. *Montgomery Ward Co.*, 324 U. S. 858; *Saxe* v. *Anderson*, 302 U. S. 688. Although this Court possesses power to grant a petition for certiorari prior to judgment by a Court of Appeals in exceptional cases involving great public interest,[1] this is a power not ordinarily exercised. *The Three Friends*, 166 U. S. 1, 49; *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 385.

[1] 28 U. S. C. 1254 (1); 28 U. S. C. 2101 (d); United States Supreme Court Rule 39; *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 243, 295 (power of Congress to invalidate "gold clauses" in private money contracts); *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 333–334 (constitutionality of Railroad Retirement Act of 1934); *United States* v. *United Mine Workers of America*, 330 U. S. 258, 261 (1947 coal strike).

Here there is no matter of great public interest necessitating an early ruling by this Court. While there may be other officers on active duty in the armed services with a status analogous to that of the petitioner (see Pet. 5), he has not brought a representative class suit on their behalf, and so far as we are advised, his is the only pending action raising the question he poses. Moreover, not being scheduled for release from active duty until June 2, 1952 [2] (Pet. 5), petitioner has failed to show that he would be unable to get a decision by the Court of Appeals and a ruling by this Court on a petition for certiorari by that date. Indeed, the Court of Appeals, which set the case for argument on January 9 upon a week's notice, obviously is giving the matter expeditious consideration. Accordingly, it cannot be said that the petitioner will not have time to seek review by this Court after decision by the Court of Appeals, if that decision should be adverse to him. Moreover, petitioner is asking this Court to grant certiorari without giving to the Court of Appeals an opportunity to decide a case which it has already heard.

2. For present purposes, we rely upon the opinion of the District Court (R. 64–70) as constituting a correct determination of the substantive question presented by the petition.

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[2] We are informed by the office of the Judge Advocate General that petitioner is presently on active duty in Paris, France, on General Eisenhower's staff.

CONCLUSION

Petitioner has failed to show any exceptional circumstances justifying a grant of the writ of certiorari which would prevent the Court of Appeals from deciding a case which it has already heard. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JANUARY 1952.

APPENDIX

Section 37 of the National Defense Act of r the pur-
Stat. 154 (10 U. S. C. § 351 *et seq.*): of officers
en needed
ficers' Re-

OFFICERS' RESERVE CORPS. For the al officers
pose of providing a reserve of of ns corre-
available for military service when ne es of the
there shall be organized an Officers' tional sec-
serve Corps consisting of general of rect. The
and officers assigned to sections c number in
sponding to the various branches of sident may
Regular Army and such additional ted in the
tions as the President may direct. eserve offi-
grades in each section and the numb led in the
each grade shall be as the President Such ap-
prescribe. All persons appointed in t of briga-
Officers' Reserve Corps are reserve the Presi-
cers and shall be commissioned in rs by and
Army of the United States. Such the Senate.
pointments in grades below that of b he Officers'
dier general shall be made by the P period of
dent alone, and general officers by nt in force
with the advice and consent of the Se continue in
Appointment in every case in the Offi its termi-
Reserve Corps shall be for a perio ficer of the
five years, but an appointment in be entitled
at the outbreak of war shall contin deral service
force until six months after its te rmination if
nation: *Provided,* That an officer of Any offi-
Officers' Reserve Corps shall be ent Corps may
to be relieved from active Federal se he discretion
within six months after its terminati
he makes application therefor. Any
cer of the Officers' Reserve Corps
be discharged at any time in the discr
of the President. * * *

Section 127a, Par. 7, of the National Defense Act, 48 Stat. 161, 54 Stat. 875 (10 U. S. C. § 513):

> In time of war or national emergency determined by the President any officer of the Regular Army may be appointed to higher temporary grade without vacating his permanent appointment. In time of war any officer of the Regular Army appointed to higher temporary grade, and all other persons appointed, as officers, shall be appointed and commissioned in the Army of the United States. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: *Provided,* That an appointment, other than that of a member of the Regular Army made in time of war, shall continue until six months after its termination, and an officer appointed in time of war shall be entitled to be relieved from active Federal service within six months after its termination if he makes application therefor.

Joint Resolution of September 22, 1941 (H. J. Res. 199, 55 Stat. 728):

> That during the present emergency, temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service

of the United States to serve therein for such periods of time as the President may prescribe. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate: *Provided,* That any appointment made under the provisions of this Act may be vacated at any time by the President and, if not sooner vacated, shall continue during the present emergency and six months thereafter: *Provided further,* That any person appointed as an officer in the Army of the United States under the provisions of this Act shall receive the same pay and allowances and be entitled to the same rights, privileges, and benefits as members of the Officers' Reserve Corps of the same grade and length of active service: *And provided further,* That nothing contained in this Act shall be construed to prohibit the appointment of officers in the various components of the Army of the United States in accordance with existing laws.

Joint Resolution of December 13, 1941 (S. J. Res. 117; 55 Stat. 799–800; 50 U. S. C. App. §§ 731–732):

That the provisions of Public Resolution Numbered 96, Seventy-sixth Congress, approved August 27, 1940, as amended, and of Public, Numbered 783, Seventy-sixth Congress (the Selective Training and Service Act of 1940), as amended, insofar as they restrict the territorial use of units and members of the Army of the United States, are suspended during the existence of any war in which the United States is

engaged, and during the six months immediately following the termination of any such war.

Sec. 2. The periods of service, training and service, enlistment, appointment, or commission, of all members of the Army of the United States now or hereafter in or subject to active military service of the United States are extended for the period stated in the preceding section: *Provided,* That nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case.

* * * * *

Joint Resolution of July 25, 1947 (S. J. Res. 123, 61 Stat. 449):

* * * * *

Sec. 2. Notwithstanding the termination date or termination period heretofore provided therefor by law, the following statutory provisions are repealed effective upon the date hereinafter specified, or upon the expiration of the period hereinafter specified, and shall remain in full force and effect until such date or until the expiration of such period. Such statutory provisions are hereby amended accordingly.

a. Repeal effective July 1, 1948:

* * * * *

Act of September 22, 1941 (55 Stat. 728, ch. 414), as amended:

* * * * *

Sec. 3. In the interpretation of the following statutory provisions, the date when this joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by

the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941;

* * * * *

Section 2 of the Act of December 13, 1941 (55 Stat. 799, ch. 571):

* * * * *

Paragraph 3 of section 127a as added to the Act of June 3, 1916 (39 Stat. 166), by section 51 of the Act of June 4, 1920 (41 Stat. 759, ch. 227);

* * * * *

Approved July 25, 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947